No. 89-253

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STANLEY G. PINKHAM,
Petitioner

V.

STATE OF MAINE,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Amendment provision against double jeopardy is violated where, in the course of jury deliberations in a multiple indictment criminal case alleging a single criminal act, the jury renders verdicts that are factually inconsistent and incapable of logical reconcilation.

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The opinion of the Supreme Judicial Court of Maine in State of Maine v. Stanley G. Pinkham, Decision No. 5041, Law Docket No. HAN-88-288 (Decided April 7, 1989), which held that the jury verdict in this case did not violate the defendant's Fifth Amendment right against double jeopardy, is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Stanley G. Pinkham, Decision No. 5041, Law Docket No. HAN-88-288 (Decided April 7, 1989), was entered on April 7, 1989, and the court's mandate, dated April 5, 1989, was entered on April 10, 1989. The sixty day period

provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition ends on June 6, 1989.

Petitioner Stanley G. Pinkham invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides, inter alia, that

> No person shall . . . be subject for the same offence [sic] to be twice put in jeopardy of life or limb . . . .

STATEMENT OF THE CASE

On February 17, 1987, a Hancock County grand jury returned a three-count indictment

against Stanley G. Pinkham, charging him with three felony counts of rape, gross sexual misconduct, and unlawful sexual contact based upon a single criminal act. The statutes under which defendant was charged, 17-A M.R.S.A. § 252(1) (rape); 17-A M.R.S.A. 253(1)(A) (gross sexual misconduct); and 17-A M.R.S.A. § 255 (unlawful sexual contact), require different factual determinations by a jury in order to support a conviction. In the circumstances of this case, a guilty verdict on the rape charge required that the jury find proof of penetration, while a guilty verdict on the gross sexual misconduct charge required proof of only genital-to-genital contact. The unlawful sexual contact charge was never reviewed by the jury and therefore plays no role in the instant petition.

At trial, the only evidence of sexual contact between the defendant and the alleged victim came through testimony of the victim. That testimony consisted of the following colloquy between the victim and the state's attorney:

> Q. Do you remember what happened then?
>
> A. Yes.
>
> Q. What happened?
>
> (pause)
>
> A. He put his penis into my vagina (crying), and he pulled it in and out for about ten minutes.

Prior to submission of the case to the jury, the court agreed that the facts adduced at trial would support a conviction on only one of the three charges contained in the indictment. The court then instructed the

jury to consider first the rape charge, and determine whether the defendant was guilty or not guilty of that charge. If it found the defendant guilty of that charge, its deliberations would cease. If it found the defendant not guilty of the rape charge, it should go on to consider the gross sexual misconduct charge, and so forth through the end of the three count indictment.

After receiving the court's instructions and deliberating, the jury returned a verdict of not guilty of rape, but guilty of gross sexual misconduct. Petitioner then filed an appeal with the Maine Supreme Judicial Court, alleging, inter alia, that the jury's verdict was factually inconsistent and incapable of logical reconciliation, and further alleging

that the verdict was violative of the prohibition against double jeopardy contained in the Fifth Amendment of the U.S. Constitution.

The gravamen of defendant's appeal was that there was no evidence of genital-to-genital contact independent of the evidence of penetration presented at trial. By finding the defendant not guilty of rape, the jury negatived the only competent evidence of genital-to-genital contact, which was the victim's own testimony as to penetration. This left nothing to support a verdict on the gross sexual misconduct charge. The verdicts of not guilty as to rape but guilty as to gross sexual misconduct were therefore factually inconsistent and

incapable of logical reconciliation on appeal.

REASON FOR GRANTING THE WRIT

The decision by this Court in Dunn v. United States, 284 U.S. 390 (1932), is unconstitutional and must therefore be reversed.

In Dunn v. United States, 284 U.S. 390 (1932), this Court held that "[c]onsistency in the verdict is not necessary," see Dunn, 284 U.S. at 393. In Dunn, which arose and was decided during the era of prohibition, the defendant had been indicted on three counts, "first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second, for unlawful possession of intoxicating liquor and third, for the unlawful sale of such liquor." Id. at 391. The jury convicted

Dunn on the first count, but entered verdicts of not guilty as to the second and third counts. Id. On appeal, Dunn challenged the verdicts as inconsistent, on the grounds that the evidence supporting the three charges was identical. Id. at 392. In its opinion, the Court affirmed the conviction, holding that, since "[e]ach count in an indictment is regarded as if it were a separate indictment," the same result could have been reached in three separate trials. Id. at 393.

In a dissent from the majority in Dunn, Justice Butler noted that the jury could only have based its verdict on contradictory findings of fact.

> By finding petitioner not guilty under the second and third counts, the jury conclusively established that the evidence was not

> sufficient to prove the unlawful possession or sale there alleged. Since the first count charged nothing more than unlawful possession, this amounted to contradictory findings on the same fact . . . . Possession was alleged in the second count and negatived by the jury. Nothing remains to support the opposite finding under the first count . . . . I am of opinion [sic] that this record plainly requires an express and unqualified decision that these finds conflict and are completely repugnant.

Id. at 398-99 (Butler, J., dissenting).

In upholding the jury verdict in the Pinkham case, the Maine Supreme Judicial Court did nothing more than follow the Dunn holding, as it has done in a series of decisions in recent years, see, e.g., State v. Snow, 513 A.2d 274, 277 (Me. 1986); State v. Engstrom, 453 A.2d 1170, 1174 (Me. 1982); State v. DiPietro, 420 A.2d 1233, 1237 (Me.

1980); State v. Upton, 362 A.2d 738, 740 (Me. 1976).

This Court recently reaffirmed its holding in Dunn in United States v. Powell, 469 U.S. 57 (1984). In Powell, the Court stated that

> [i]nconsistent verdicts . . . present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

Powell, 469 U.S. at 65; see also City of Los Angeles v. Heller, 106 S. Ct. 1571, 1576 (1986) (Stevens, J., dissenting).

It is the petitioner's position that the rule enunciated Dunn substitutes a rule of

convenience for the clear implications of the double jeopardy clause found in the U.S. Constitution. The delegation of function to a jury in a criminal trial is the delegation of fact finding authority only. Judgment is then entered by the court based upon a determination of the evidence by the jury. A jury that finds facts inconsistent with the evidence presented at trial, or that finds one way with respect to one count and another way with respect to another count, exceeds its authority and injects an element of caprice and arbitrariness into the result.

Because the jury first considered, and rejected, the evidence in support of the rape charge, and then reconsidered and accepted that evidence with respect to gross sexual misconduct, the verdict is violative of the

Constitution's protection against double jeopardy. No rule of convenience would justify the defendant's being twice placed in jeopardy of a conviction based upon the same evidence that had moments before been rejected.

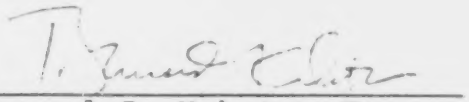
This Court should clearly state that jury nullification or compromise is permissible only when the evidence adduced at trial would logically support such a result. It is the petitioner's position that such a rule logically and inescapably emanates from the provisions of the Fifth Amendment. This case therefore presents the Court with an opportunity to reverse its holding in the Dunn case and restore the fullest measure of protection to criminal defendants under the Fifth Amendment guidelines with respect to double jeopardy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Stanley G. Pinkham, Decision No. 5041, Law Docket No. HAN-88-288 (April 7, 1989).

Respectfully submitted,

STANLEY G. PINKHAM

By 

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Dated: July 6, 1989

CERTIFICATE OF SERVICE

I, Bernard J. Kubetz, Esq., do hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) corrected copies of the foregoing petition for a writ of certiorari to be served on the only other party to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to Respondent's Counsel of Record, Gail Marshall, Esq., as follows:

Gail Marshall, Esq.
Office of the District
Attorney
60 State Street
Ellsworth, Maine 04605

Dated at Bangor, Maine, this 4th day of August, 1989.

By _____

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Appendix A

Maine Supreme Judicial Court
Reporter of Decisions
Decision No. 5041
Law Docket No. HAN-88-288

STATE OF MAINE

v.

STANLEY G. PINKHAM

Argued - March 13, 1989
Decided - April 7, 1989

Before MCKUSICK, C.J., and ROBERTS, WATHEN, GLASSMAN, CLIFFORD, HORNBY AND COLLINS, JJ.

WATHEN, J.

A jury in the Superior Court (Hancock County, Delahanty, J.) acquitted Stanley G. Pinkham of rape, 17-A M.R.S.A. § 252(1) (1983 & Supp. 1988), but convicted him of gross sexual misconduct. 17-A M.R.S.A. § 253(1)(A) (1983 & Supp. 1988). On appeal from the conviction, he argues that the Superior Court erred in refusing to suppress

statements he made to the investigating officer. He also argues that the jury verdict is incapable of logical reconciliation. We find no error and we affirm the judgment.

Before trial, Pinkham moved to suppress statements he made to Trooper Setler of the Maine State Police after meeting Setler at his courthouse office. The presiding justice denied Pinkham's motion, finding no "indicia of custody." On appeal Pinkham argues that when an investigating officer knows that a particular person is a primary suspect, good faith requires that the Miranda warnings be given even though the person is not in custody. This argument is totally unsupported by any authority.

We have stated that "Miranda warnings are mandated only where a suspect is both in custody and subjected to interrogation as these terms are

understood under the Miranda doctrine." State v. Philbrick, 436 A.2d 844, 848 (Me. 1981) (cites omitted). Furthermore, the trial court's finding of no custodial interrogation will be upheld if the record provides rational support for that determination. State v. Thibodeau, 496 A.2d 635, 638 (Me. 1985) cert. denied 475 U.S. 1141 (1986). In this case, the Superior Court could rationally have found that defendant went voluntarily to the interview and knew that he was free to leave at any time. The Superior Court appropriately concluded that a reasonable person in defendant's position would not have believed that he was being restrained to the degree associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam); State v. Gardner, 509 A.2d 1160, 1163

(Me. 1986). Therefore the court did not err in denying the suppression motion.

We also find no merit in defendant's argument that the jury verdict was inconsistent and incapable of logical reconciliation. He correctly observes that, as charged in this case, the crime of rape includes the elements of gross sexual misconduct and the additional element of penetration. Because the victim testified to penetration and the jury found only genital to genital contact, defendant claims that the jury was compelled to reject her testimony in toto. Our review of the record, however, persuades us that a jury could rationally entertain a reasonable doubt as to penetration and yet find beyond a reasonable doubt the essential elements of gross sexual misconduct.

The entry is: Judgment affirmed.

McKusick, C.J., and Glassman, J., Clifford, J., and Collins, J., concurring.

Hornby, J., with whom Roberts, J. joins, concurring.

I cannot agree that on the evidence presented at trial the jury rationally could find the essential elements of gross sexual misconduct without also finding the element of penetration that constitutes rape. Pinkham's acquittal on the charge of rape, however, does not require his acquittal on the charge of gross sexual misconduct any more than his conviction on the latter requires his conviction on the former. There was sufficient evidence for the jury to find beyond a reasonable doubt all the elements of gross sexual misconduct. No more is required to affirm that conviction regardless of the disposition of the rape charge. Dunn v. United States, 284 U.S. 390, 393 (1932);

State v. DiPietro, 420 A.2d 1233, 1237 (Me. 1980) (dictum); see State v. Snow, 513 A.2d 274, 277 (Me. 1986) ("This Court has never decided that inconsistent verdicts do require reversal."). I therefore agree that the judgment should be affirmed.